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No. 91-724

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY

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PETITIONERS' REPLY

ARGUMENT

In its brief in opposition, Group Health Association, Inc. ("GHA") argues that a grant of certiorari is not warranted in this case because the decision below is consistent with those of other circuits and that in passing the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), Congress has provided the guidance petitioners sought from this Court. GHA misperceives the import of the Civil Rights Act of 1991, however, for this case cannot be resolved without consideration of the effect of that Act. For this reason, the Court must grant the petition for certiorari.

1. Petitioners argued that the lower courts have misapplied this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), both by extending it outside the context of employment at will and by reading

Patterson to leave racially motivated contract terminations outside the scope of 42 U.S.C. § 1981. In its passage of the Civil Rights Act, Congress resolved these issues.

Specifically, in Section 101 of the Act, subsection (2), Congress provided:

> For purposes of [42 U.S.C. § 1981], the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Under the amended definition, petitioners undeniably (and concededly, *see* Op. Cert. at 6) have stated a claim. That is, they have claimed that GHA terminated and refused to renew their contract because of racial prejudice. *See* Pet. App. 13a.

Contrary to GHA's opposition, the passage of the Civil Rights Act does not counsel against granting this petition. Rather, this Court's practice is to grant petitions where intervening legislative enactments bear on the issues presented. *See, e.g., Weinberger v. Ramirez de Arreland*, 471 U.S. 1113 (1985) (granting, vacating and remanding *en banc* opinion of the District of Columbia Circuit for consideration of the Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 98-473 (1985)); *Immigration and Naturalization Service v. National Center for Immigrants' Rights*, 481 U.S. 1009 (1987) (granting, vacating and remanding decision of the Ninth Circuit for consideration of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986)); *Union Gas Co. v. Pennsylvania*, 479 U.S. 1025 (1987) (granting, vacating and remanding opinion of the Third Circuit for consideration of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986)). This case cannot be resolved without consideration of the impact of the Civil Rights Act of 1991. Accordingly, this Court must grant the petition to allow for that consideration.

2. Since the enactment of the Civil Rights Act on November 21, 1991, there has been considerable litigation in the lower courts concerning the Act's applicability to pending cases. *See e.g. Stender v. Lucky Stores*, No. C-88-1467 (N.D. Cal. Dec. 19, 1991) (applying § 102 of the Act to a pending private sector case); *Mojica v. Gannett Co., Inc.* No. 90-C3827 (N.D. Ill. November 27, 1991) (same); *Van Meter v. Barr*, No. 91-0027 (D.D.C. December 18, 1991) (refusing to apply § 102(b) and (c) of the Act in a federal sector case and noting the presence of 322 cases invoking the Civil Rights Act of 1964 pending in the district). Thus this case, like thousands of others pending in the lower courts, now includes an issue concerning the applicability of the 1991 Act.

While this Court's customary practice in cases involving intervening legislative enactments is to grant, vacate and remand, this case presents an ideal vehicle for resolving the issue of the applicability of the 1991 Act to pending civil rights cases. Thus, petitioners request that the Court grant certiorari here to decide the specific question of whether the amendments made by the Civil Rights Act of 1991, and in particular Section 101 of the Act, apply to cases pending upon its enactment.

It would seem certain that this question will ultimately reach this Court. The district courts that have considered the issue have already reached different conclusions and have employed differing rationales in doing so. Given the current state of flux in this Court's teachings on retroactivity of legislation, *see Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1577 (1990) (noting "apparent tension" between the presumption of retroactivity in *Bradley v. Richmond School Board*, 416 U.S. 696, 712 (1974), and the presumption of prospectivity in *Georgetown University Hospital v. Bowen*, 488 U.S. 204, 208 (1988)), the circuits will likely diverge on this issue as well.

An enormous judicial economy could be captured by addressing the question that is squarely before the Court

here. As noted above, there are literally thousands of civil rights cases pending throughout the country that require a definitive resolution of this question. Until this Court resolves the issue, it will continue to be litigated in the lower courts, only later to be superseded by this Court's ultimate decision. This would waste not only scarce judicial resources, but millions of taxpayers' and litigants' dollars as well.

Indeed, this petition arises on the Court's calendar at a particularly opportune time. Were this Court to grant the petition to address this issue, briefing and argument could be completed this Term. Obviously, the sooner this Court can reach the issue, the greater the judicial economy. This Court should not let pass the unique opportunity to resolve this issue of substantial public importance.

3. As Justice White recognized in his dissent in *Bonjorno*, the presumption of retroactivity varies depending on the type of statute involved. *Bonjorno*, 110 S.Ct. 1593-94. *See also id.*, at 1579 n.1, (Scalia, J., dissenting) (distinguishing between penal and nonpenal legislation). Thus *Bowen*'s suggestion that there is an overall presumption of nonretroactivity to legislation, 109 S.Ct. at 471, is painted with too broad a brush. Rather, some legislation must be presumed retroactive, and some not.

Certainly when Congress acts to reject Supreme Court authority and thus return the law to its previous posture, its legislation must be presumed to apply retroactively. *See e.g. Ayers v. Allain*, 893 F.2d 732, 755, *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990), *cert. granted*, 111 S.Ct. 1579 (1991) (applying retroactively the provision of the Civil Rights Restoration Act of 1987 that overruled *Grove City College v. Bell*, 465 U.S. 555 (1984)). *See also Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (applying to a pending case Congress' enactment reversing *Smith v. Robinson*, 468 U.S. 992 (1984)). Indeed, it would be to impute a bizarre motive to Congress to presume that in renouncing an opinion of

this Court and returning the law to its intended state Congress meant to allow the erroneous construction to stand for any period.

In renouncing *Patterson*, Congress performed a constitutional function that it shares with this Court. Had this Court, rather than Congress, reversed *Patterson*, the presumption would have been that that reversal would apply retroactively. *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2443 (1990); *United States v. Security Industrial Park*, 459 U.S. 70, 79 (1982). There is no reason to presume that Congress, in performing this co-equal function, would have intended its corrective power to run more narrowly than the judiciary's. On the contrary, if the theory behind retroactive application of judicial decisions is that the court is simply declaring what the law has always meant, *see American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2343 (1990) (Scalia, J. concurring), the same must hold true when Congress corrects Supreme Court constructions that deviate from the legislature's original intent.

Finally, whatever the presumption of retroactivity may be, that presumption must yield if application of the statute would work manifest injustice. *Bradley*, 416 U.S. at 711. Here, it would be manifestly unjust to relieve GHA of liability for conduct that was unlawful at the time of its occurrence. By non-retroactive application of the Civil Rights Act of 1991, GHA would escape liability through the brief window between *Patterson*'s rejection of the longstanding interpretation of 42 U.S.C. § 1981, and Congress' rejection of *Patterson*. And it would do so at the expense of petitioner's congressionally reaffirmed right to be free of racial discrimination.

There is of course, far more to be said on the issue of the applicability of the Civil Rights Act of 1991 to pending cases. Petitioners request that the Court grant plenary review to allow for the presentation of these arguments.

CONCLUSION

For the foregoing reasons, and for those reasons set forth in our petition, the petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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